

**From:** achurch@achurch.org@inetgw  
**To:** Microsoft ATR  
**Date:** 1/24/02 12:10pm  
**Subject:** Microsoft Settlement

To whom it may concern:

I am a United States citizen, and I am submitting a comment in response to the proposed settlement in the U.S. vs. Microsoft antitrust case in accordance with 15 U.S.C. section 16 (the Tunney Act).

I am strongly opposed to the proposed settlement in the Microsoft antitrust case. The proposed settlement fails to either appropriately redress Microsoft's past illegal acts or prevent Microsoft from repeating or continuing such acts in the future.

The majority of the restrictions placed on Microsoft's conduct by Section III, "Prohibited Conduct," are in fact no more restrictive than practices Microsoft has voluntarily adopted recently in response to this case or to public outcry, and are certainly no stronger than one would ordinarily expect a law-abiding company to obey. For example, paragraph III.A.2 of the proposed settlement requires Microsoft to not retaliate against an OEM for "shipping a Personal Computer that (a) includes both a Windows Operating System Product and a non-Microsoft Operating System"; yet this is behavior expected from any company in a monopoly position, and in fact required by antitrust law--so why is such a clause stated in the proposed settlement?

Furthermore, the proposed settlement allows Microsoft extraordinary latitude in its implementation. For example, section VI subsection U, which defines "Windows Operating System Product", states that "[t]he software code that comprises a Windows Operating System Product shall be determined by Microsoft in its sole discretion." Microsoft could--and its past actions suggest that it likely would--use this clause to arbitrarily declare certain software to be part of or not be part of a particular Windows product, to its own benefit; and even if claims of improper behavior were raised, they would only start another long round of litigation, and the proposed settlement could well expire before the claims were finally resolved. Another section which merits concerns is section III subsection J, which allows Microsoft to (1) avoid disclosure of any information it arbitrarily claims "would compromise the security of . . . encryption or authentication systems" and (2) effectively avoid disclosure of any information on such systems to individual researchers or other groups which do not meet Microsoft's "standards . . . for certifying the authenticity and viability of [their] business[es]". Especially with respect to (1), Microsoft could easily claim that any information it does not want to release would "compromise the security" of such systems, and third parties would have no way to verify the truth of the claim because they would not have access to the information.

Most importantly, however, I am appalled at the lack of any punitive action in the settlement. One of the prime tenets of any judicial system, or indeed any system with rules, is that a violation of the rules (laws) results in punishment: a punitive action, above and beyond a simple requirement to obey the rules in the future, which costs the transgressor more than any benefit they may have gained from their violations. In the system of rules which is United States law, such punishment may take the form of monetary fines, imprisonment, or other penalties; however, the proposed settlement inexplicably fails to include any penalties or even restraints on conduct other than requiring Microsoft to obey the law--which it should be doing in the first place! At most, the imposition of a Technical Committee and Microsoft Internal Compliance Officer could be considered "penalties" in the sense that law-abiding companies are not subject to such oversight, but as the remainder of the settlement does not impose any additional penalties, this could hardly be considered "punishment" in the ordinary sense. Since Microsoft has already been found to have broken the law, any final judgement in this case must include some form of actual punishment greater in degree than Microsoft's gains from its illegal activities, whether that punishment be fines, loss of intellectual property (for example, requiring Microsoft to place the source code to its Windows operating system or other products in the public domain), or some other action. The lack of such a punishment should by itself be sufficient reason to reject the proposed settlement.

While an amicable settlement between both parties is a desirable resolution to any court case, the simple fact that a settlement was reached should not ipso facto overrule concerns about the efficacy of that settlement, particularly in a case such as this which concerns the entire American people. The proposed settlement is completely ineffective at either providing redress for Microsoft's past illegal acts or preventing a repetition of such acts in the future, and on those grounds I believe it should be rejected by the Court.

Sincerely,

Andrew M. Church